



## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application Number L-11989]

#### **Proposed Exemption for Certain Prohibited Transactions Involving the Association of Washington Business (AWB) HealthChoice Employee Benefits Trust Located in Olympia, Washington**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed exemption.

**SUMMARY:** This document gives notice of a proposed individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA). The exemption would permit the trustee of a plan funded by the AWB HealthChoice Employee Benefits Trust to hire entities affiliated with AWB to provide services to the plan for a fee, subject to conditions designed to safeguard the interests of the plan and its participants and beneficiaries.

**DATES:** Comments due: Written comments and requests for a public hearing on the proposed exemption must be received by the Department by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Exemption date: If granted, the exemption will be in effect as of the date of publication of the final exemption in the *Federal Register*.

**ADDRESSES:** All written comments and requests for a hearing should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. L-11989 via email to [e-OED@dol.gov](mailto:e-OED@dol.gov) or online through <https://www.regulations.gov>. Any such comments or requests should be sent by the end of the scheduled comment period. The application for the exemption and the comments received will be available for public inspection in the Public Disclosure

Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Comments and hearing requests will also be available online at <https://www.regulations.gov> at no charge. See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

**FOR FURTHER INFORMATION CONTACT:** Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8557 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Comments:**

Persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments should state the nature of the person's interest in the proposed exemption and how the person would be adversely affected by the exemption, if granted. Any person who may be adversely affected by an exemption can request a hearing on the exemption. A request for a hearing must state: (1) The name, address, telephone number, and email address of the person making the request; (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the *Federal Register*. The Department may decline to hold a hearing if: (1) the request for the hearing does not meet the requirements above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

WARNING: All comments received will be included in the public record without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment.

Additionally, the <http://www.regulations.gov> website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EBSA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Internet.

**Background:**

*AWB HealthChoice Employee Benefits Trust*

According to its website, the Association of Washington Business (AWB) is Washington State’s largest statewide business association.<sup>1</sup> As described in the exemption application, AWB members can offer medical, dental, vision, and life insurance benefits to their eligible employees by participating in a fully-insured ERISA-covered employee welfare benefit plan (the Plans). The Plans are funded through multiple industry trusts

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<sup>1</sup> <https://www.awb.org/about-us/who-we-are/> (“Formed in 1904, the Association of Washington Business is Washington’s oldest and largest statewide business association, and includes nearly 7,000 members representing 700,000 employees.”)

(Industry Trusts) that comprise the AWB HealthChoice Employee Benefits Trust. The trustee for each Industry Trust (the Trustee) is a representative (e.g., employee, officer, or director) of an employer participating in the Plan (Participating Employer) that is in a specific industry classification.<sup>2</sup> The Trustees are Plan fiduciaries under ERISA, responsible for performing a wide range of activities in administering the Plans, including selecting service providers.

Two wholly-owned subsidiaries of AWB, Forterra and ProPoint, have provided services to the Plans since the Plans' inception in 2013. Forterra provides administrative services to the Plans, such as preparing the Form 5500 and other notices and disclosures and negotiating contracts with insurance carriers. ProPoint is an insurance producer that provides quotes for insurance products and assists in annual renewal of insurance coverage for the Plans. In a limited number of cases, ProPoint also acts as the insurance broker of record for individual employers and receives an additional fee for these services that is paid by the Plan.<sup>3</sup> In addition to Forterra's and ProPoint's fees, the Plans pay fees for billing and recordkeeping services to Vimly Benefits Solutions, Inc. (Vimly), a service provider that is unaffiliated with AWB.

Fees to Forterra and ProPoint and other service provider fees are paid out of trust assets, which are composed of employer and employee contributions. At the time of initial and annual enrollment, Participating Employers receive a quote for the "total premium," covering insurance premiums and services, and a "Related Party Fee Disclosure and Services Agreement" disclosing the services provided by AWB affiliates to the Plans and the fees paid to them. For purposes of the exemption, the Department

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<sup>2</sup> The industry classifications are: manufacturing, professional services, retail/wholesale, hospitality, construction, agriculture, communications, technology, and transportation.

<sup>3</sup> When ProPoint acts as a broker of record for an employer, it provides services such as presenting quotes to the employer, helping the employer select plans, employee/employer enrollment meetings and individualized support to employees with questions regarding their coverage. When ProPoint is not the broker of record, these same services are provided by brokers that are not affiliated with AWB.

assumes that the fees are for legitimate Plan purposes and payment for actual services provided to the Plans and not for services provided to the Participating Employers and insurance companies.

### *Pathway I Associations*

Under ERISA, an employee welfare benefit plan must be established or maintained by an “employer” or an “employee organization” or both.<sup>4</sup> ERISA section 3(5) defines an “employer” as “... any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” As stated in sub-regulatory guidance on this definition, the Department will evaluate all of the relevant facts and circumstances to determine whether a group or association is a “bona fide group or association of employers, acting in the interest of its employer members to provide benefits for their employees.”<sup>5</sup> The Department’s sub-regulatory guidance on bona fide employer groups and associations is sometimes referred to as “Pathway 1,” to distinguish it from a group or association described in the Department’s regulation at 29 CFR 2510.3-5, which was vacated by court order.<sup>6</sup>

AWB, Forterra and ProPoint (the Applicants) represent that each Industry Trust is an “employer” within the meaning of ERISA section 3(5). The Applicants further represent that the Arrangement is sponsored by “one or more bona fide ‘Pathway 1’ associations as defined by applicable legal authority in accordance with ERISA and applicable guidance issued by the United States Department of Labor.”<sup>7</sup> The Department has relied on these representations to propose this exemption, and this background

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<sup>4</sup> ERISA section 3(1).

<sup>5</sup> Advisory Opinion 2019-01A (July 8, 2019).

<sup>6</sup> *State of New York v. United States Department of Labor*, 363 F.Supp.3d 109, (March 28, 2019).

<sup>7</sup> The Applicant made these representations in a draft trust agreement provided to the Department.

discussion does not reflect factual findings or opinions of the Department.

### *Prohibited Transactions*

ERISA prohibits fiduciaries with respect to employee welfare benefit plans from engaging in certain transactions, including transactions that involve self-dealing, unless an exemption applies.<sup>8</sup> In this case, the Applicants represent that the Trustees are vested with fiduciary authority to select service providers for the Plans. Because of the Plans' close relationship with AWB (e.g., the Plans are available only to AWB member employers, and AWB affiliates Forterra and ProPoint have provided services to the Plans since their inception), there is cause for concern that, in the absence of appropriate safeguards, Forterra's and ProPoint's relationship with AWB could affect the Trustees' exercise of their best judgment as fiduciaries with respect to the selection of plan service providers.

The Department has authority under ERISA section 408(a) to grant an exemption from the prohibited transaction rules only if the Department finds that the exemption is administratively feasible, in the interests of affected plans and of their participants and beneficiaries, and protective of the rights of such participants and beneficiaries. This proposed exemption includes conditions designed to ensure that each Trustee is fully informed of their fiduciary obligations with respect to the Plan, possesses sole fiduciary authority over Plan service provider selection and monitoring, and exercises their authority in accordance with ERISA's fiduciary standards. Although this exemption was requested by AWB, Forterra and ProPoint, the prohibited transaction relief would extend only to the Plan Trustees and provide no relief for AWB or its affiliates. AWB, Forterra and ProPoint represent that (i) the Plans are established or maintained by the Industry

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<sup>8</sup> See ERISA section 406.

Trusts, as associations acting indirectly in the interests of the Participating Employers, and (ii) the Trustees of the Industry Trusts have sole fiduciary authority over the selection of service providers for the Plans.

The proposed exemption would provide relief from ERISA section 406(b)(1), which prohibits fiduciary self-dealing. Each Trustee is a fiduciary, subject to the provisions of ERISA sections 403 and 404. This means that each Plan's assets must be used for the exclusive purpose of providing benefits to participants and beneficiaries covered by that Plan and defraying reasonable expenses of administering the Plan. The Trustees that are part of the Arrangement are permitted to confer with each other and collectively enter into service provider agreements or otherwise act collectively on behalf of all the Plans. However, each Trustee is a fiduciary with respect to the Plan for which it is a trustee. Each Plan must always have a Trustee in order to satisfy the conditions of the exemption, and that Trustee may not permit the assets, management, or operation of any Plan to be used to benefit participants and beneficiaries of another Plan. The proposed exemption would not provide relief from ERISA section 406(b)(2), which prohibits fiduciaries from acting on behalf of a party whose interests are adverse to the interests of the plan. This ensures that Trustees may not act on behalf of anyone with interests adverse to a Plan and its participants and beneficiaries.

The proposed exemption also would not provide relief from ERISA section 406(a)(1)(C), which prohibits fiduciaries from engaging parties in interest as service providers; that relief is available under the statutory exemption provided in ERISA section 408(b)(2). To the extent the Trustees fail to comply with ERISA section 408(b)(2) in connection with hiring AWB or any of its affiliates as service providers to the Plans, for example, by paying fees that exceed reasonable compensation, AWB or its affiliates

may be subject to liability for knowing participation in a prohibited transaction.<sup>9</sup>

## **Description of the Proposed Exemption**

### *Covered Transactions*

If the proposed exemption is granted, it would provide relief from the restrictions of ERISA section 406(b)(1) only for the Trustee of each Plan to select AWB or any Affiliate,<sup>10</sup> including Forterra and ProPoint (each an AWB-Affiliated Service Provider), to provide services to the Plan, provided that the applicable conditions of Sections III and IV are satisfied, subject to the definitions of terms in Section I.<sup>11</sup>

### *Conditions*

The proposal sets forth conditions regarding the following aspects of each Plan's structure: each Trustee's role and fiduciary duties in selecting AWB or any Affiliate as a service provider for the Plan; the Trustee's authorization to pay fees to AWB or any Affiliate; the content of required disclosures the Trustees must provide to Participating Employers; and the Trustees' recordkeeping requirements. Several of the conditions in the proposal are based on sections of ERISA other than the prohibited transaction provisions. For example, ERISA section 404 requires plan fiduciaries to act with prudence and loyalty, and ERISA section 408(b)(2)(B) requires specific disclosures from

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<sup>9</sup> See *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000). The Department notes its longstanding position that the proposal or grant of a prohibited transaction exemption is not dispositive of whether a prohibited transaction has occurred or will occur.

<sup>10</sup> The term "Affiliate" is defined in section I(c) of the proposal as a person that is: (1) controlling, controlled by, or under common control with AWB; (2) an officer, director, partner, or employee of AWB; or (3) a corporation or partnership of which AWB is an officer, director, partner, or employee. For purposes of this definition, "control" means the power, direct or indirect, to exercise a controlling influence over the management or policies of a person other than an individual.

<sup>11</sup> The Applicants requested relief from Internal Revenue Code (Code) section 4975, which imposes an excise tax on certain prohibited transactions involving plans described in Code section 4975(e)(1). Although the Department has authority under Reorganization Plan No. 4 of 1978 to provide exemptions from Code section 4975, the Department is not proposing this relief based on its understanding that the Plan is not a plan described in Code section 4975(e)(1).



service providers.<sup>12</sup>

The Department is proposing the following phased implementation of the exemption. The conditions in Section III are based on current practices of the Arrangement that the Applicant has represented in its exemption application and that the Department intends to formalize to protect Plan participants and beneficiaries. These conditions would apply as of the date a final exemption is published in the *Federal Register* (the Grant Date). The conditions in Section IV would apply beginning on the first day of the first plan year that starts after the Grant Date, because those conditions may require changes to existing practices or contractual provisions.

#### *Plan Structure and Role of A Trustee*

Section III(a) of the proposed exemption addresses the structure for each Plan. Section III(a)(1) would require each Plan to be a fully-insured employee welfare benefit plan, and Section III(a)(2) would require each Plan to be established or maintained by an employer within the meaning of ERISA section 3(5). These conditions are consistent with the Applicants' representations regarding the structure of the Arrangement.

Section III(a)(3) would impose several requirements regarding each Trustee, intended to ensure that each Trustee is independent of the AWB and its Affiliates. First, the Trustee would be required to be an employee, officer, director, or owner of a current Participating Employer in the industry classification associated with the Plan. Second, the Trustee must be nominated by a Participating Employer in the industry classification associated with the Plan and elected by a majority vote of Participating Employers in the industry classification. Third, the Trustee must be independent of AWB and its Affiliates. A Trustee will be considered independent if it: (1) is not an Affiliate of AWB or a trustee, employee, officer, director, member or agent of any Affiliate of AWB, and (2) does not

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<sup>12</sup> This applies to service providers to pension plans and service providers providing brokerage services or consulting to a group health plan.

have a relationship with or an interest in AWB or any of its Affiliates that might affect the exercise of the person's best judgment in connection with transactions described in Section II of this exemption. Thus, no Trustee can serve on AWB's governing board while that Trustee is a fiduciary to the Plan. The Trustee also may not receive, directly or indirectly, any compensation or other consideration for their personal account from AWB or any Affiliate in connection with any transaction involving the Plan. Finally, the Trustee may not be an employee, officer, director, member or agent of a Participating Employer that is a service provider to any Plan.

Section III(a)(4) would require the Participating Employers in each industry classification to have the sole authority to: (A) remove the Trustee with respect to the Plan associated with that industry classification, with or without cause, by majority vote; and (B) dissolve or amend the Plan associated with that industry classification by majority vote. These conditions are intended to ensure that the Participating Employers have appropriate control over the Plan.

Section III(a)(5) would require each Trustee to receive fiduciary training so that they are able to understand and appropriately exercise their authority in accordance with ERISA's standards as required by the exemption. The fiduciary training would be required to be conducted by a professional who has appropriate technical training and proficiency with ERISA and who has been prudently selected by the existing Trustees. At a minimum, the training should cover ERISA compliance, fiduciary duties, the exemption conditions and the consequences for failing to comply with the conditions, including any loss of exemptive relief provided by the exemption. The training should explain, in detail, the Trustee's responsibilities under each condition of this exemption. The Trustee must understand their obligation to act independently of AWB, and the specific standards they must meet. The Trustee must also be informed that its failure to comply with any of the exemption conditions could result in prohibited transactions in violation of ERISA.

For existing Trustees, the exemption would require fiduciary training within three months after the exemption's Grant Date, and annually thereafter. After the Grant Date, the training would be required to be provided broadly to all persons who are nominated as Trustees, before their agreement to serve as a Trustee begins, as well as on an annual basis for any person who is elected as a Trustee.

Section III(a)(6) would prohibit the Plans and Participating Employers from indemnifying AWB, Forterra and ProPoint, for any reason. Section III(a)(7) would prohibit the legal counsel for any Plan from also representing AWB or any Affiliate. This is to further ensure the independence of the Trustees as they oversee the operation of the Plans.

#### *Fiduciary Selection of Service Providers*

Section III(b) of the proposed exemption would focus on the selection of Plan service providers, including AWB, Forterra, ProPoint, or any other Affiliate. Section III(b)(1) would require each Trustee to have and exercise sole fiduciary authority to select service providers for its Plan. Prudent selection of service providers is a core fiduciary requirement in ERISA. The Department's website provides resources on prudent selection and monitoring of services providers.<sup>13</sup> As noted above, the exemption would require the interests of each Plan to be represented by a Trustee with respect to the transactions covered by the exemption and the conditions.

Before entering into or renewing service contracts with an AWB-Affiliated Service Provider on behalf of a Plan, Section III(b)(2) would require each Trustee to determine that the services are necessary to the operation of the Plan and to document the specific reasons for that determination. The Trustee would consider factors such as

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<sup>13</sup> See "Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan" available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf>.

whether an AWB-Affiliated Service Provider and its personnel have the qualifications and capability to perform the services, whether the fees reflect arm's-length terms, and whether the arrangements are reasonable, compared with similarly qualified service providers. The documentation of the Trustee's determinations must provide sufficient context and detail and be written in a manner to ensure that any party authorized to review the records under Section III(e) can understand the reasoning for the determination for the selection.

Section III(b)(3) would require the Plans' contracts (including renewals) with AWB-Affiliated Service Providers to be limited to no more than three-years duration and allow the Trustee to terminate the contract any time without penalty to the Plan by providing thirty (30) days' written notice. This does not mean that the Plans must regularly switch service providers. The exemption would permit the Trustee to renew service provider contracts for a new three-year term if the Trustee determines that the renewal is prudent. Any renewal would be required to comply with the conditions for selecting service providers set forth in Section III(b), including the Trustee's regular review of all of the Plan's service providers and their fees.

Section III(b)(4) would impose additional conditions when the AWB-Affiliated Service Provider is also the insurance broker of record for a Participating Employer. The Trustee must comply with Section III(b)(2) and determine and document that the services are necessary for the operation of the Plan and that the selection of the AWB-Affiliated service provider is prudent and loyal. Additionally, the Trustee would be required to obtain the Participating Employer's written certification that it has received a disclosure from the Trustee that includes descriptions of the following: (i) the nature of the affiliation between the AWB-Affiliated Service Provider and AWB; (ii) the services that the AWB-Affiliated Service Provider will provide; and (iii) the amount of fees that the

AWB-Affiliated Service Provider will receive.<sup>14</sup> If the fee is disclosed as a percentage of another amount, it must be accompanied by an example of the calculation expressed in dollars. The Department envisions that this disclosure will assist Participating Employers in understanding the potential for conflicts of interest if they elect to hire that AWB-Affiliated Service Provider as their insurance broker of record. Finally, the Trustee must review all compensation paid from the Plan to brokers of record and ensure that commissions paid to the AWB-Affiliated Service Provider are no greater than the lowest commission received by an insurance broker of record that is not an Affiliate of AWB.

Section III(b)(5) of the exemption would require the Trustee to monitor all AWB-Affiliated Service Providers prudently and loyally in accordance with ERISA section 404. In addition to prudently selecting service providers under Section III(b)(1), the Trustee has an obligation to continuously ensure that AWB-Affiliated Service Providers are acting in accordance with the conditions of the exemption at all times.

#### *Fees*

Section III(c) would govern the Trustee's payment of fees and other compensation to AWB-Affiliated Service Providers. Trustees must approve all fees and other compensation, in writing, and only after determining that the fees and compensation are: (1) direct payments from the Plan; (2) for services that are both necessary and actually rendered; and (3) do not exceed reasonable compensation within the meaning of ERISA section 408(b)(2). The Plan is not permitted to pay any of AWB's expenses associated with the Plan or any non-Plan expenses.<sup>15</sup>

#### *Disclosure*

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<sup>14</sup> The Department notes that, pursuant to Section IV(b)(1)(B), discussed below, the AWB-Affiliated Service Provider would not be permitted to receive any fees from third parties. Thus, the fees that the AWB-Affiliated Service Provider will receive from the Plan will be the only compensation that such provider receives.

<sup>15</sup> The Department notes that settlor expense incurred by AWB on behalf of Participating Employers are not permissibly charged to a Plan, regardless of the existence of a prohibited transaction exemption.

Section III(d) of the proposed exemption is intended to ensure that Participating Employers choosing health insurance for their employees have the information they need to make an informed decision regarding the Plans' use of AWB-Affiliated Service Providers as Plan service providers.

Section III(d)(1) would require the Trustee to distribute certain disclosures to a Participating Employer at initial enrollment and at each annual renewal thereafter. These disclosures focus on the relationships between the Trustees, AWB, and the service providers. Section III(d)(1)(A) requires a description of the relationship between AWB and any other AWB-Affiliated Service Provider that the Trustee has selected. Section III(d)(1)(B) requires a statement that the Trustee is a fiduciary with respect to the Plan and that before entering into or renewing any services contracts with an AWB-Affiliated Service Provider on behalf of the Plan, the Trustee exercised their fiduciary authority in accordance with ERISA section 404 to prudently and loyally select service providers. Lastly, Section III(d)(1)(C) requires a statement that the Participating Employers, directly or indirectly through the Trustees, have control over the Plan, including the authority and control to select alternative service providers to AWB or AWB-Affiliated Service Providers.

Section III(d)(2) is based on the statutory disclosure requirements in ERISA section 408(b)(2)(B)(v). ERISA section 408(b)(2)(B) requires service providers that enter into a contract or arrangement with a group health plan for brokerage services or consulting to provide important disclosures regarding its services and compensation. The Department has determined that AWB-Affiliated Service Providers should provide similar disclosures regarding their services and compensation. This section requires that the Trustee receive the disclosure from the AWB-Affiliated Service Providers and review, approve, and distribute those disclosures to Participating Employers at initial enrollment and at each annual renewal date thereafter.

Section III(d)(2)(A) requires the AWB-Affiliated Service Provider to provide the Trustee a description of the services to be provided to the Plan. Section III(d)(2)(B) requires a description of all direct compensation, both in the aggregate and by service, the AWB-Affiliated Service Provider (including any subcontractor) reasonably expects to receive from the Plan. This is broader than the statutory language in ERISA section 408(b)(2)(B)(iii)(III), which requires a description of all direct compensation “*either* in the aggregate or by service” (emphasis added). Because Section III(c)(1) requires all compensation received by an AWB-Affiliated Service Provider to be direct payments from the Plan, the exemption does not include language similar to that in ERISA section 408(b)(2)(B)(iii)(IV) providing for disclosure of indirect compensation. Under Section III(d)(2)(C), any AWB-Affiliated Service Provider must provide a description of any compensation that will be paid among the AWB-Affiliated Service Provider or a subcontractor, if such compensation is set on a transaction basis (such as commissions, finder’s fees, or other similar incentive compensation based on business placed or retained). The AWB-Affiliated Service Provider must identify the services for which such compensation will be paid and the payers and recipients of such compensation (including the status of a payer or recipient as an Affiliate or a subcontractor) regardless of whether such compensation also is disclosed under Section III(d)(2)(A) and/or (B).

Section III(d)(2)(D) requires a description of any compensation that the AWB-Affiliated Service Provider, an Affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement and how any prepaid amounts will be calculated and refunded upon such termination. Section III(d)(2)(F) requires a description of the manner in which the compensation described in clause (B) through (D), as applicable, will be received.

#### *Recordkeeping*

Section III(e) of the proposed exemption would require each Trustee to maintain

records necessary to demonstrate that they have satisfied the conditions of the exemption. These records must be kept in a manner that is reasonably accessible for examination for six years following the date of any transaction that relies on the exemption.

The records must be reasonably available at their customary location for examination during normal business hours by any authorized employee or representative of the Department; any Participating Employer or fiduciary of a Plan, or any authorized employee or representative of these entities; any individual participant or beneficiary of a Plan or any authorized representative of the participant or beneficiary.

Participants and beneficiaries of a plan, plan fiduciaries, and contributing employers/employee organizations would be able to request only information applicable to their own transactions, and would not be permitted to examine records that are confidential, privileged trade secrets or privileged commercial or financial information. If a Trustee refuses to disclose information to a party other than the Department on the basis that the information is exempt from disclosure, the Trustee must provide the requestor a written notice, within 30 days, advising the requestor of the reasons for the refusal and that the Department may request such information. The requestor would then be able to contact the Department if it believes it would be useful for the Department to request the information.

Section III(e)(3) requires the Trustee to generate the information that is necessary and sufficient for the Trustee to demonstrate that the conditions of the exemption have been met over the prior six-year period within 30 days of a request by the Department. This requires such records to be properly maintained on an ongoing basis and reinforces the Department's position that it is necessary for a Trustee to be regularly aware and mindful of the conditions of the exemption.

#### *Material Facts and Representations*

Section III(f) would condition the exemption's relief on the material facts and



representations provided by the Applicants being true and accurate at all times. In the event that a material fact or representation is untrue or inaccurate, the exemptive relief provided under this exemption would cease immediately.

#### *Phase-In Conditions*

The following additional conditions would apply as of the first day of the first plan year after the Grant Date. Many of these conditions are focused on documentation, which require some time for the Trustees to prepare, review, and update. Therefore, the Department is providing additional time before these conditions become applicable.

Section IV(a) would impose additional conditions on Plan documents. Section IV(a)(1) requires all Plan documents and disclosures to accurately describe the role and fiduciary status of the Trustee and not include any disclaimers of fiduciary status for any party. Plan documents and disclosures may not indicate, in any way, including on a website, that AWB or its Affiliates are the sponsor of the Plan. Similarly, Section IV(a)(2) requires that the insurance contract(s) used to fund benefits must be held in the name of the Plan or the Plans collectively. Thus, while the exemption would not require AWB or any Affiliate to be a fiduciary to the Plan, AWB and its Affiliates are not permitted to publicly state that they are not fiduciaries. ERISA's definition of fiduciary is a functional one. If AWB takes part in the Trustees' fiduciary duties and decision-making, AWB will also be a fiduciary under ERISA. Furthermore, the exemption would not provide relief for any prohibited transactions caused by AWB or an Affiliate that is acting as fiduciary.

Section IV(a)(3) would require contracts entered into between the Trustee and an AWB-Affiliated Service Provider to specify that any information the AWB-Affiliated Service Provider provides to the Trustee, Participating Employers, and prospective Participating Employers regarding their services to the Plan and related fees is materially accurate at the time it is provided. This is not limited to the disclosure set forth in Section

III(d) or IV(c) or (d); rather, it applies to all information AWB and its Affiliates provide to the Trustee or directly to Participating Employers, which they may use in deciding whether to enroll or re-enroll in the Plan.

Section IV(b) would impose additional conditions on fees. Section IV(b)(1) provides that, before entering into any contract for services with an AWB-Affiliated Service Provider, the Trustee must negotiate the rate of fees to be paid for services to the Plan. The exemption would require the contract to specify that the rate may not be increased during the contract period and that the AWB-Affiliated Service Provider may not receive any indirect or other compensation related to services provided under the contract.

Under Section IV(b)(2), fees paid by the Plans to a service provider other than any insurance broker of record that is not an Affiliate of AWB must be established independently of other service provider fees. This would ensure that an increase in one fee could not, directly or indirectly, cause an increased payment to another service provider. If fees are not established independently, there would be a question as to whether the resulting fee was reasonable and charged for necessary services. Notwithstanding this condition, fees may be calculated as percentages of premiums paid to the insurance company that is not an Affiliate of AWB. The Applicants have represented that the Plans are fully-insured and the premiums are set by Premier Blue Cross, an unrelated party, and the premiums are negotiated at arm's length. Because the insurance premium is independently established, the service provider fees can be a percentage of that insurance premium if the Trustees determine it is prudent to do so. Under Section IV(b)(3), fees collected from Participating Employers and Plan participants must be based on actual, rather than estimated, amounts due to service providers.

Section IV(c) would impose additional disclosure obligations to ensure that

Participating Employers choosing health insurance for their employees have the information they need to make an informed decision regarding the Plans' use of an AWB-Affiliated Service Provider. Therefore, Section IV(c)(1) would require the upfront disclosure to Participating Employers in Section III(d)(1) to include the following additional information: (A) a description of any fees that the AWB-Affiliated Service Provider, or any of their Affiliates or subcontractors, reasonably expects to receive in connection with termination of the Plan and how those fees would be calculated; and (B) a description of the methodology for calculating fees paid to AWB-Affiliated Service Provider, including examples with dollar amounts. Percentages and formulas alone will not satisfy this condition. This expands on the condition in Section III(b)(4)(iii) that would require—as of the Grant Date—examples of fee calculation only when the fee is disclosed as a percentage of another amount.

Section IV(c)(2) would add a condition that Plan documents include a requirement that the AWB-Affiliated Service Provider furnish, upon written request, any information the Trustee reasonably requests, within 30 days after the request. If the disclosure cannot be provided within 30 days due to extraordinary circumstances beyond the control of the AWB-Affiliated Service Provider, the information must be provided as soon as reasonably practicable, and the AWB-Affiliated Service Provider must provide the Trustee with a notice explaining why they cannot meet the 30-day deadline.

Under Section IV(d), the Trustees must also provide a monthly billing statement to Participating Employers that includes the following statement:

The amounts you pay each month for health insurance coverage include fees for administrative services, including fees paid to service providers affiliated with the Association of Washington Business (AWB). A description of the services provided by each AWB affiliate is provided to you at the time of your initial enrollment and at each annual renewal. You can also contact [NAME, phone number, email address] for additional copies.

The monthly billing statement must also include a chart accurately listing all service providers and fee percentages or other amounts they receive. The chart, therefore, must

identify AWB-Affiliated Service Providers and non-Affiliated service providers so that Participating Employers can see the total service provider cost associated with the Plan. If any administrative fees are expressed as a percentage of the insurance premium, the disclosure also must include an example showing how fees would be calculated based on a \$1,000 insurance premium. The monthly billing statement would also provide a point of contact (including phone number and email address) to request copies of disclosures or for additional information regarding the fees.

### **Notice to Interested Persons**

Notice of the proposed exemption will be provided to all interested persons within fifteen (15) days of the publication of the notice of proposed exemption in the *Federal Register*. The notice will be provided to each Participating Employer in the manner approved by the Department. The mailing will contain a copy of the notice of proposed exemption as published in the *Federal Register* and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty-five days (45) of the date of publication of this proposed exemption in the *Federal Register*. All comments will be made available to the public.

**Warning:** If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

## **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code Section 4975(c)(2) does not relieve a fiduciary or other party in interest from certain other provisions of ERISA, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404, which, among other things, require a fiduciary to discharge their duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with ERISA section 404(a)(1)(B); nor does it affect the requirement of Code Section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and/or Code Section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemption would be subject to the express condition that the material facts and representations contained in the application are true and complete at all times and that the application accurately describes all material terms of the transactions which are the subject of the exemption.

## Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

### *Section I. Definitions.*

(a) “**AWB**” means the Association of Washington Business.

(b) “**AWB-Affiliated Service Provider**” means AWB, Forterra, Inc., ProPoint, LLC, or any other entity providing services to the Plan that is an Affiliate.

(c) An “**Affiliate**” is a person that is:

(1) Controlling, controlled by, or under common control with AWB;

(2) An officer, director, partner, or employee of AWB; or

(3) A corporation or partnership of which AWB is an officer, director, partner, or employee.

For purposes of this definition, “**control**” means the power, direct or indirect, to exercise a controlling influence over the management or policies of a person other than an individual;

(d) The “**Grant Date**” is the date the final exemption is published in the *Federal Register*.

(e) “**Participating Employer**” means the member employers of AWB who provide medical, dental, vision, and life insurance benefits to their employees through the Plan.

(f) “**Plan**” means any plan that is funded by the AWB HealthChoice Employee Benefits Trust, including through an Industry Trust.

(g) A “**Trustee**” is a person elected in accordance with Section III(a)(3).

## *Section II. Covered Transactions.*

If granted, the exemption would provide relief to the Trustees for the selection of an AWB-Affiliated Service Provider to provide services to the Plans for a fee, if the conditions of Sections III and IV are met, subject to the definitional terms in Section I. The exemption would provide only relief from the restrictions of ERISA section 406(b)(1).

## *Section III. General Conditions.*

The following conditions apply for each Plan as of the Grant Date, as defined in Section I(d).

### (a) Plan Structure

(1) The Plan is a fully-insured employee welfare benefit plan.

(2) The Plan is established or maintained by an employer within the meaning of ERISA section 3(5).

(3) The Trustee with respect to the Plan:

(A) Is a trustee, employee, officer, director, or owner of a Participating Employer in the industry classification associated with the Plan;

(B) Is nominated by a Participating Employer in the industry classification associated with the Plan and elected by a majority vote of Participating Employers in the industry classification;

(C) Is independent of AWB and its Affiliate, which means the Trustee (1) is not an Affiliate of AWB or a trustee, employee, officer, director, member or agent of any Affiliate of AWB, and (2) does not have a relationship with or an interest in AWB or any of its Affiliates that might affect the exercise of the person's best judgment in connection with transactions described in Section II of this exemption; and

(D) Is not an employee, officer, director, member or agent of a Participating Employer that is also a service provider to any Plan.

(4) The Participating Employers in each industry classification have the sole authority to:

(A) Remove the Trustee with respect to the Plan associated with that industry classification, with or without cause, by majority vote; and

(B) Dissolve or amend the Plan associated with that industry classification by majority vote.

(5) Each person who is nominated to serve as a Trustee to the Plan undergoes fiduciary training before their decision to serve as a Trustee, if elected, and annually thereafter. The fiduciary training is provided by a professional who has appropriate technical training and proficiency with ERISA and who has been prudently selected by the board of Trustees and covers, at a minimum, ERISA compliance, fiduciary duties, the conditions of the exemption, and the consequences of failing to comply with the conditions (including any loss of exemptive relief provided herein). Existing Trustees as of the Grant Date receive this training within 3 months of the Grant Date.

(6) Neither the Plan nor any Participating Employer indemnifies AWB or its Affiliates for any reason.

(7) Legal counsel for the Plan does not also represent AWB or any Affiliate.

(b) Selection of Service Providers

(1) The Trustee has and exercises sole fiduciary authority to select service providers for the Plan. The Trustee exercises their fiduciary authority in accordance with ERISA section 404 to prudently and loyally select service providers and document the selection process and considerations, including whether an AWB-Affiliated Service Provider and its personnel have the qualifications and capability to perform such services; whether the fees to be charged reflect arm's-length terms; and whether the arrangements



are reasonable, compared with similarly qualified service providers. The documentation must provide sufficient context and detail and be written in a manner to ensure that any party authorized to review the records under Section III(e) can understand the reasoning for the selection.

(2) Before entering into or renewing any services contracts with an AWB-Affiliated Service Provider on behalf of the Plan, the Trustee determines that the services are necessary to the operation of the Plan and documents the reasons for the determination.

(3) Contracts (including renewals) between the Plan and an AWB-Affiliated Service Provider:

(A) Are limited to no more than three years' duration; and

(B) Allow the Trustee to terminate the contract any time without penalty to the Plan by providing thirty (30) days' written notice.

(4) The AWB-Affiliated Service Provider may be compensated by the Plan for its services as an insurance broker of record to a Participating Employer only if:

(A) The Trustee selects the AWB-Affiliated Service Provider in accordance with Section III(b)(2);

(B) The Trustee obtains the Participating Employer's written certification that it has received a disclosure from the Trustee that includes descriptions of:

(i) the nature of the affiliation (as described in Section I(c)) between the AWB-Affiliated Service Provider and AWB;

(ii) the services that will be provided by the AWB-Affiliated Service Provider; and

(iii) the amount of fees that the AWB-Affiliated Service Provider will receive, provided that if the fee is disclosed as a percentage of another amount, it is accompanied by an example of the calculation expressed in dollars; and

(C) The Trustee ensures the Plan pays the AWB-Affiliated Service Provider for its services as broker of record no more than the lowest commission paid to an unaffiliated broker of record.

(5) The Trustee monitors the AWB-Affiliated Service Provider's performance of services and compliance with the applicable conditions of this exemption prudently and loyally in accordance with ERISA section 404.

(c) Fees

The Trustee approves, in writing, all fees or other compensation paid to AWB-Affiliated Service Providers for services to the Plan, after determining that the fees and other compensation are:

- (1) direct payments from the Plan;
- (2) for services that are necessary and actually rendered to the Plan; and
- (3) do not exceed reasonable compensation within the meaning of ERISA section 408(b)(2).

(d) Disclosure

(1) The Trustee distributes the following disclosures to Participating Employers at initial enrollment and at each annual renewal thereafter:

(A) A description of the relationship between AWB and any other AWB-Affiliated Service Provider that the Trustee has selected;

(B) A statement that that the Trustee is a fiduciary with respect to the Plan and that before entering into or renewing any services contracts with an AWB-Affiliated Service Provider on behalf of the Plan, the Trustee exercised their fiduciary authority in accordance with ERISA section 404 to prudently and loyally select service providers; and

(C) A statement that the Participating Employers, directly or indirectly through the Trustees, have control over the Plan, including the authority and control to select alternative service providers to AWB or AWB-Affiliated Service Providers.

(2) The Trustee receives the following disclosure from the AWB-Affiliated Service Providers, and reviews, approves and distributes the disclosures to Participating Employer at initial enrollment and at each annual renewal thereafter:

(A) A description of the services that are to be provided by any AWB-Affiliated Service Provider to the Plan;

(B) A description of all compensation, both in the aggregate and by service, the AWB-Affiliated Service Providers and any subcontractor reasonably expect to receive from the Plan;

(C) A description of any compensation that will be paid among the AWB-Affiliated Service Providers or a subcontractor, if such compensation is set on a transaction basis (such as commissions, finder's fees, or other similar incentive compensation based on business placed or retained). The AWB-Affiliated Service Provider must identify the services for which such compensation will be paid and identify the payers and recipients of such compensation (including the status of a payer or recipient as an Affiliate or a subcontractor) regardless of whether such compensation also is disclosed pursuant to paragraph (E) or (F), below;

(D) A description of any compensation that the AWB-Affiliated Service Provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination; and

(E) a description of the manner in which the compensation described in clause (B) through (D), as applicable, will be received.

(e) Recordkeeping

(1) The Trustee maintains for a period of six (6) years, in a manner that is reasonably accessible for examination, the records necessary to enable the persons described in paragraph (2) below to determine whether the conditions of this exemption

have been met, except that:

(A) If such records are lost or destroyed due to circumstances beyond the control of the Trustee, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(B) No party in interest other than the Trustee will be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained or are not available for examination as required below:

(2)(A) Except as provided in paragraph (B) below, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in Section III(d)(1) are reasonably available at their customary location for examination during normal business hours by:

(i) Any authorized employee or representative of the Department;

(ii) Any Participating Employer or fiduciary of a Plan, or any authorized employee or representative of these entities; or

(iii) Any individual participant or beneficiary of a Plan or any authorized representative of the participant or, beneficiary; and

(B) None of the persons described in paragraph (e)(2)(A)(ii) or (iii) of this Section are authorized to examine records that are confidential, privileged trade secrets, or privileged commercial or financial information.

(C) If the Trustee refuses to disclose information on the basis that the information is exempt from disclosure under subsection (B), the Trustee must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

(3) The Trustee must provide sufficient information necessary for it to demonstrate that the exemption conditions have been met over the prior six-year period.

The Trustee must maintain and retain such records in a manner that ensures it would be able to provide the information to the Department within 30 calendar days of a request.

(f) Material Facts and Representations

All the material facts and representations provided by the Applicants are true and accurate at all times.

*Section IV. Phase-In Conditions.*

The following additional conditions apply as of the first day of the first plan year after the Grant Date.

(a) Plan Documents and Contracts

(1) Plan documents and disclosures:

(A) accurately describe the role and fiduciary status of the Trustee;

(B) do not include any disclaimers of fiduciary status for any party, including AWB and any Affiliate; and

(C) do not indicate, in any way, including on a website, that AWB or its Affiliates are the sponsor of the Plan.

(2) The insurance contract is held in the name of the Plan.

(3) AWB-Affiliated Service Providers contractually agree that all information they provide to the Trustee, Participating Employers and prospective Participating Employers regarding their services to the Plan and related fees is materially accurate at the time it is provided.

(b) Fees

(1) Before entering into any contract for services with an AWB-Affiliated Service Provider on behalf of the Plan, the Trustee:

(A) Negotiates the rate of fees to be paid for services to the Plan and ensures that the rate does not increase during the contract period; and

(B) Contractually prohibits the AWB-Affiliated Service Provider from

receiving any fees other than those paid directly by the Plan.

(2) Fees for service providers, other than any insurance broker of record that is not Affiliated with AWB, are established independently of other service provider fees, so that an increase in one fee does not, directly or indirectly, cause an increased payment to another service provider. For purposes of this condition, a service provider fee does not include an insurance premium (i.e., fees may be calculated as percentages of premiums paid to the insurance company).

(3) Fees collected from Participating Employers and Plan participants are based on actual, rather than estimated, amounts due to service providers.

(c) Disclosure

(1) The disclosure described in Section III(d)(1) includes the following additional information:

(A) A description of any compensation that the AWB-Affiliated Service Provider, or any subcontractor, reasonably expects to receive in connection with termination of a contract or arrangement with the Plan and how any prepaid amounts will be calculated and refunded upon such termination; and

(B) A description of the methodology by which AWB-Affiliated Service Provider fees are calculated, including examples with dollar amounts.

(2) The Plan documents require the AWB-Affiliated Service Provider to furnish, upon written request, any information the Trustee reasonably requests, within 30 days after the request unless the disclosure cannot be provided due to extraordinary circumstances beyond the control of the AWB-Affiliated Service Provider, in which case the information must be provided as soon as reasonably practicable and the AWB-Affiliated Service Provider must provide the Trustee with a notice explaining why they cannot meet the 30-day deadline.

(d) Monthly billing statements

The Trustees provide to Participating Employers a monthly billing statement that includes:

(1) The following statement: “The amounts you pay each month for health insurance coverage include fees for administrative services, including fees paid to service providers affiliated with the Association of Washington Business (AWB). A description of the services provided by each AWB affiliate is provided to you at the time of your initial enrollment and at each annual renewal. You can also contact [NAME, phone number, email address] for additional copies.”

(2) A chart accurately listing all service providers and the fee percentages or other amounts they receive. If any administrative services fees are expressed as a percentage of the insurance premium, the disclosure must also include an example showing how fees would be calculated based on a \$1,000 insurance premium; and

(3) A point of contact, including a phone number and email address, for copies of disclosures or for additional information.

Exemption date: If granted, the exemption will be in effect as of the date of publication of the final exemption in the *Federal Register*.

Signed at Washington, DC.

**George Christopher Cosby,**  
*Director, Office of Exemption Determinations,*  
*Employee Benefits Security Administration,*  
*U.S. Department of Labor.*